Response Requested

ORIGINAL

No. 02-5636

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 20 2002
CLERK

Robert Justin Kaupp,
Petitioner

v.

The State of Texas,
Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fourteenth District of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles A. Rosenthal, Jr.
Harris County District Attorney

Donald W. Rogers, Jr.*
William J. Delmore III
Assistant District Attorneys
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
*Counsel of Record

Counsel for Respondent

RECEIVED
DEC 24 2002
CLERK
SUPREME COURT, U.S.

28 pp

QUESTION PRESENTED

The confession of the Defendant should have been suppressed because the illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant. The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause. The Texas Courts did not apply the correct test to determine if there was a waiver of constitutional rights under the United States Constitution. (Petition for Writ of Certiorari, pp. i, 3).

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OFAUTHORITIES.....iii

STATEMENT OF THE CASE.....1

REASONS FOR DENYING THE PETITION.....9

Lack of Compliance With Supreme Court Rule 14.1(g)(i).....9

Petitioner's Question Presented for Review Is Inconsistent With The Contentions He Raised In The Appellate Court Below.....10

Petitioner's Contention Was Not Decided by The Highest State Court Because It Was Not Properly Presented.....12

The Case Was Properly Decided Under Correct Legal Standards by the Appellate Court Below.....14

Review Is Sought of a Decision Turning Upon An Analysis of the Particular Facts Involved.....20

No Conflicting Decisions or Unsettled Questions.....21

CONCLUSION 22

CERTIFICATE OF SERVICE.....23

TABLE OF CITED AUTHORITIES

Cases

Adams v. Robertson,
520 U.S. 83, 89 (1997).....1, 12, 14

Board of Directors of Rotary International v. Rotary Club of Duarte,
481 U.S. 537 (1987).....13

Braxton v. United State,
500 U.S. 344 (1991).....21

Bumper v. North Carolina,
391 U.S. 543, 548-49 (1968).....17

California v. Beheler,
463 U.S. 1121, 1125 (1983).....19

Florida v. Bostick ,
501 U.S. 429 (1991).....16, 20

Fox v. State,
930 S.W.2d 607 (Tex. Crim. App. 1996).....13

Gotthilf v. Sills,
375 U.S. 78 (1963).....14

Guzman v. State,
955 S.W.2d 85, 89 (Tex.Crim.App.1997).....3

Johnson v. Zerbst,
304 U.S. 458, 464 (1938).....11

Maxwell v. State,
73 S.W.3d 278, 281 (Tex.Crim.App. 2002).....17

Michigan v. Jackson,
475 U.S. 625, 633 (1986).....16

Rhodes v. State,
945 S.W.2d 115, 117-18 (Tex.Crim.App. 1997).....18

Romero v. State,
800 S.W.2d 539, 543 (Tex. Crim. App. 1990).....3

State v. Ross,
32 S.W.3d 853, 855 (Tex.Crim.App. 2000).....3

Stansbury v. California,
511 U.S. 318 (1994).....18, 20

United States v. Matlock,
415 U.S. 164 (1974).....17, 20

United States v. Doe,
465 U.S. 605 (1984).....20

United States v. Mendenhall,
446 U.S. 544 (1980).....12

Statutes

28 U.S. C. § 1257.....14

Court Rules

SUPREME COURT RULE 10.....20

SUPREME COURT RULE 10 (a-c).....21

SUPREME COURT RULE 14.1(g)(i).....9, 10, 13

SUPREME COURT RULE 15.....1

No. 02-5636

SUPREME COURT OF THE UNITED STATES

Robert Justin Kaupp,
Petitioner

v.

The State of Texas,
Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fourteenth District of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the respondent State of Texas, acting by and through the Harris County District Attorney's Office, hereby submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History

Petitoner was charged by indictment with the felony offense of the murder of Destiny Thetford, alleged to have occurred in Harris County, Texas, on or about January 13, 1999. Petitioner was tried on the allegations in the indictment before a jury in the

262nd District Court of Harris County. The jury found petitioner guilty of murder as alleged in the indictment, and thereafter assessed his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of fifty-five (55) years. The trial court thereafter sentenced petitioner and entered judgment in accordance with the jury's verdicts. Petitioner appealed his conviction to the Court of Appeals for the Fourteenth District of Texas sitting at Houston, Texas, hereinafter referred to as the appellate court below. Petitioner's conviction was affirmed by the court below by a unanimous unpublished opinion dated June 7, 2001, a true copy of which appears in Appendix A to the petition for writ of certiorari and may also be found at 2001 WL 619119 (Tex.App.—Houston (14 Dist.)). Petitioner subsequently filed a petition for discretionary review with the Court of Criminal Appeals of Texas. The petition for discretionary review was denied without written opinion by the Court of Criminal Appeals on May 1, 2002. A true copy of the notice from the Court of Criminal Appeals of Texas appears in Appendix B to the petition for writ of certiorari.

Facts

The relevant facts as to the events in question were substantially determined by the trial court from conflicting evidence presented at a hearing on a pretrial motion to suppress evidence filed by petitioner, who thereby sought to suppress his complained of written statement or confession on the theory that it was the product of an illegal arrest. A true copy of the trial court's findings of fact and conclusions of law appears in Appendix C of the petition for writ of certiorari. The facts as expressly or impliedly

found by the trial court were also briefly summarized in the written opinion of the Court of Appeals for the Fourteenth District of Texas, a true copy of which appears in Appendix A of the petition for writ of certiorari and may also be found at 2001 WL 619119 (Tex.App.—Houston (14 Dist.)).[1] No additional relevant facts were presented at the trial of the case. A brief summary of the facts relevant to the question presented for review, prepared from the trial court's findings of fact and conclusions of law and the appellate record of suppression hearing testimony, follows.[2]

---

[1] Standards of appellate review for a trial court's factual determinations in connection with a motion to suppress evidence in Texas are consistent with federal standards. Texas appellate courts generally apply an abuse of discretion standard of review to a trial court's factual determinations giving almost total deference to a trial court's determination of historical facts that the record supports, especially when the trial court's findings are based on an evaluation of credibility and demeanor. The same amount of deference is given to a trial court's determination of mixed questions of law and fact if the resolution of those questions turns on an evaluation of credibility and demeanor. *De novo* review is applied to mixed questions of law and fact, such as probable cause, not turning on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997).

In a hearing on a motion to suppress evidence, the trial judge is the sole trier of fact, judge of the credibility of witnesses, and the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990). Texas appellate courts only decide if a trial court's findings of fact are supported by the record, are not at liberty to disturb a trial court's findings of fact that are supported by the record, and address only the question of whether the trial court improperly applied the law to the facts. *Id.*

If a trial court fails to file findings of fact or make a finding on a particular fact, the appellate court will view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its rulings as long as the implied findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000).

[2] There is no joint appendix. Reference to the trial court's findings of fact and conclusions of law appearing in Appendix C of the petition for writ of certiorari will be by (App. C, No. [ ]) for findings of fact and (App. C, Conclusions) for conclusions of law. Reference to the opinion of the Court of Appeals for the Fourteenth District of Texas appearing in Appendix A of the petition for writ of certiorari will be by (App. A, Opinion [page(s)]). Reference to petitioner's petition for discretionary review presented to the Court of Criminal Appeals of Texas appearing in Appendix D of the petition for writ of certiorari will be by (App. D, [page(s)]). Reference to other matters appended to the petition for writ of certiorari will be similar, i.e. (App. [ ]). Reference to the court reporter's record of testimony at the suppression hearing will be by ([Vol.] M.S. [page(s)]).

On January 13, 1999, Destiny Thetford, the complainant, a fourteen-year-old girl, disappeared. Petitioner, among others, was interviewed on that date by Harris County deputy sheriffs, was cooperative, and ostensibly continued to assist in the search for the complainant for the next two weeks. (App. C, No. 1). Petitioner voluntarily went to the Harris County Sheriff's Department Homicide Division offices, hereinafter referred to as the station, with the complainant's father on January 25, 1999. At that time, Petitioner spoke to Detective Barnes and others, gave a voluntary statement, passed a polygraph examination, was informed he passed the polygraph test, and was released. (App. C, No. 2). Petitioner indicated he wanted to help them in trying to find out what happened to the complainant (2 M.S. 11).

The complainant was still missing as of January 26, 1999. Detectives investigating the case learned that the complainant's nineteen-year-old half-brother, Nicholaus Thetford, had a sexual relationship with her. They had reason to believe that Nicholaus Thetford had a motive to harm her because of the sexual relationship, and learned that he had been with petitioner on the day of the complainant's disappearance. (1 M.S. 12-15).

Petitioner and Nicholaus Thetford voluntarily came to the station on January 26, 1999 at the request of Detective Barnes. They were transported there at Barnes' request by Deputy D. L. Gray, after they were handcuffed and placed in the rear of a marked police vehicle. Neither was under arrest at the time. Testimony showed that it was standard procedure for deputies to handcuff persons who were being transported for safety reasons, as the trial court expressly found. (App. C, No. 3; 2 M.S. 16-17). This finding was supported by petitioner's testimony at the suppression hearing as well.

Petitioner admitted, among other things, at the suppression hearing that he had been cooperative with the police from January 13 to January 26, 1999, and that he went around the neighborhood putting up fliers concerning the complainant's disappearance (2 M.S. 179). He acknowledged that he voluntarily went to the station on January 25, 1999 (2 M.S. 180). He acknowledged that he also went to the station on January 26, and said that on that day he was initially handcuffed, but said the handcuffs were removed and he was allowed to wander around the building on his own. (2 M.S. 184). Petitioner was cooperative at that time, gave a second statement clarifying a point as to whether the complainant was at home when he last saw her, and was allowed to leave because he was not considered a serious suspect at the time (1 M.S. 15-17; 2 M.S. 18-19).

Nicholaus Thetford was not allowed to leave the station on January 26, 1999. Thetford ultimately failed three polygraph examinations, and at approximately 1:00 a.m. on January 27, 1999, finalized a written statement admitting among other things that he cut and/or stabbed and killed the complainant, that petitioner participated in the killing, and that they put her body in a drainage ditch or sewer pipe that ran under Thetford's house and opened in a field. The detectives had no other evidence besides Thetford's statement implicating petitioner in the murder. (App. C, No. 4; 1 M.S. 17-20; 2 M.S. 19-20)

Detective Barnes called the Harris County District Attorney's office at approximately 2:00 a.m. on January 27, 1999 seeking an arrest warrant to place petitioner in custody for further questioning. Barnes was told he could not obtain an arrest warrant

for appellant at that time, but was advised to see if petitioner would voluntarily talk with them. (App. C, No. 5; 1 M.S. 67-69; 2 M.S. 21-22).

The investigating detectives then decided to try to get petitioner in and confront him with what Nicholaus Thetford said concerning petitioner's involvement in the crime. (1 M.S. 21-22; 2 M.S. 22). According to the testimony of Detective Pinkins, they did not intend to arrest appellant at that time as they did not have either probable cause to arrest him or a warrant. (1 M.S. 49-51). The detectives then assembled a large group of officers, both in uniform and in plain clothes, for the dual purpose of locating and interviewing petitioner and recovering the complainant's body. (App. C, No. 5).

Detectives Barnes, Pinkins, and Davis, accompanied by uniformed deputies, initially went to the Thetford residence looking for petitioner as Thetford's father thought he might be there. (App. C, Nos. 5 & 6).

After determining petitioner was not at the Thetford residence, investigators, including Detectives Barnes, Pinkins, and Davis, accompanied by uniformed deputies, proceeded to petitioner's residence, while several officers stayed at the Thetford residence and contained the scene. They had not found the complainant's body at that time. (App. C. No. 6; 1 M.S. 24-25). They arrived at petitioner's residence, which was near the Thetford residence, somewhere around 3:00 a.m. on January 27, 1999. (App. C, No. 6). The testimony offered by the State and petitioner as to what occurred after the

investigators arrived at petitioner's residence conflicted, but the conflict was resolved by the express and implied findings of fact made by the trial court.[3]

Petitioner's father, Henry Kaupp, allowed the investigators in his home after Detective Pinkins informed him that they needed to speak to petitioner. Henry Kaupp was not aware if petitioner was there as he sometimes spent the night with friends, and,

---

[3] Petitioner has misstated the facts in this regard. Specifically, the State submits the following factual assertions at pages 2 and 3 of the petition are misstated: (1) "As he [petitioner's father] opened the door, he was asked if his son was at home. When he turned to go to his son's bedroom to see, three officers, two detectives and one uniformed police officer brushed past him and went directly into the Defendant's room."; (2) "Upon entering the [petitioner's] room, the officers shined a flashlight on the Defendant and one of them grabbed the Defendant, pulling him from the bed where he was sleeping and began handcuffing him. While this was going on, one of the officers stated 'We need to talk'. The Defendant responded with one word, 'O.K.'"; (3) "The Defendant remained in the locked car while the police searched the house where he was taken into custody."; (4) "It was generally accepted at the trial, that if the detention of the Defendant was not with the Decedent's [sic] consent, the confession would be inadmissible under the 'fruit of the poisonous tree' doctrine. The Prosecutor maintained that the detention was lawful because the defendant 'consented' to the detention."

Petitioner's incorrect factual assertions are contrary to the facts as found by the trial court, as discussed herein, which were amply supported by the evidence, and are based to some degree on evidence that was specifically or impliedly rejected or discounted by the trial court. Petitioner does not contend that any of the historical facts expressly or impliedly found by the trial court and accepted by the Court of Appeals for the Fourteenth District of Texas as set forth in its opinion were unsupported by the record. Petitioner's factual assertions in his petition are based in part on testimony from petitioner's father, Henry Kaupp, his mother, Tamara Kaupp, and petitioner, that was specifically rejected by the trial court in its findings of fact and conclusions of law because it found the testimony incredible. (App. C, Nos. 8-11).

Moreover, the factual account submitted by petitioner in the petition is devoid of any reference to the prior encounters between the investigating detectives and petitioner and the relationship that developed between them in connection with the investigation of the complainant's disappearance in this case before January 27, 1999, the date of the complained of statement, as pointed out and discussed herein, other than the following terse remark at p. 9 of the petition, "The fact that the Defendant has other conversations at the police station prior to the invasion of his home does not demonstrate that he consented on that occasion." These omitted facts as to the prior encounters and relationship between petitioner and the investigating detectives were clearly relevant as part of the totality of the circumstances of the case that were considered by the trial court and the appellate court below in determining that petitioner voluntarily accompanied the detectives to the station and that petitioner's complained of statement or confession was not the product of an unlawful arrest.

believing petitioner was not criminally responsible for the complainant's disappearance, led the officers to petitioner's bedroom and opened the door for them. (App. C, No. 7). According to the testimony of Detective Pinkins, petitioner woke up when the bedroom door was opened, and Pinkins said, "Robert, its Detective Pinkins. We need to go and talk." (1 M.S. 30). Pinkins testified that petitioner said "okay," and that two uniformed officers immediately went into his room and handcuffed him for safety reasons. (1 M.S. 31). Pinkins testified further that he could have instructed them not to handcuff petitioner, but never did, and indicated that they would have left the residence if petitioner had said he did not want to talk to them or was not going. (1 M.S. 31-32). Pinkins essentially said he believed at the time that petitioner consented to accompany them to the station because he had been very cooperative in the past. (1 M.S. 32). The trial court specifically found in this regard:

> Henry Kaupp led investigators to the Defendant's bedroom and opened the door for investigators. The Defendant was awakened and told by Detective Pinkins that they "needed to talk." The Defendant was unaware at this time that Nicholaus Thetford had confessed and implicated him in this offense. The Defendant replied "Okay," indicating he understood that he was to be questioned again at the Sheriff's Department Lockwood offices. The Defendant was handcuffed by Deputy Calhoun. Calhoun mistakenly believed that the Defendant was under arrest, but this fact was never manifested to the Defendant. Other Sheriff's Department personnel allowed the handcuffing as a safety procedure in transporting a witness under the circumstances.

(App. C, No. 7). The handcuffs were removed at the station prior to the time petitioner was interviewed and gave his statement (1 M.S. 86-87, 99-100). The trial court made no

specific finding as to how petitioner was dressed at the time. Detective Pinkins testified that he thought petitioner had on some shorts and a T-shirt at the time and was later taken some shoes. (1 M.S. 34-35).

Petitoner was not questioned at his residence. En route to the station, petitioner was driven by the Thetford residence where the search for the complainant's body was being conducted so he could see that they were on the verge of discovering the complainant's body. Petitioner was given his Miranda warnings upon arrival at the station. After waiving his rights and agreeing to talk to the detectives further, petitioner was confronted with Nicholaus Thetford's confession and the fact that the complainant's body was found, and thereafter voluntarily gave the investigators the written statement (State's Exhibit 2, or SX-2), of which he now complains, implicating himself in the homicide. (App. C, No. 8).

The trial court found and concluded that petitioner freely and voluntarily gave the statement without coercion, threats, violence, or promises, and that he was not placed under arrest prior to the admissions he made in connection with giving the written statement. (App. C., Conclusions). The motion to suppress evidence was denied.

REASONS FOR DENYING THE PETITION

Lack of Compliance With Supreme Court Rule 14.1(g)(i)

The petition for writ of certiorari does not comply with SUPREME COURT RULE 14.1(g)(i) in that it fails to specify the stage in the proceedings, both in the court of first instance (the trial court) and in the appellate courts, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which

they were passed on by those courts, including specific reference to the places in the record where the matter appears, so as to show the federal questions were timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Moreover, there are no record references for most facts mentioned in the petition, except for some references at pp. 7-8 of the petition to testimony as to matters that petitioner contends are favorable to his position without any showing that they were accepted or determined to be a fact by any court below. Furthermore, as heretofore pointed out, discussion of relevant facts determined and considered by the courts below as to the prior relationship between petitioner and the investigating officers was substantially omitted by petitioner. The petition should accordingly be denied for failure to comply with Supreme Court Rule 14.1(g)(i). *See Adams v. Roberston*, 520 U.S. 83, 89 n. 3 (1997)(observing in holding certiorari improvidently granted that petitioners failed to comply with Rule 14.1(g)(i) by providing specific record references).

Petitioner's Question Presented for Review Is Inconsistent With The Contentions He Raised In The Appellate Court Below

The question presented for review by petitioner, who has been represented by the same attorney at all stages of litigation in the instant case, is inconsistent with his contentions presented to the trial court and the appellate court below. Petitioner presents the following question for review in this Court:

> The confession of the Defendant should have been suppressed because the illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant. The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause. The Texas Courts did not apply the correct test to determine if there was a waiver of constitutional rights under the United States Constitution. (Petition for Writ of Certiorari, pp. i, 3).

As to the first part of petitioner's question presented for review to this Court, petitioner did not contend in the appellate court below either that "[t]he illegal detention of the Defendant by the law enforcement officers was not cured by a knowing and intentional waiver of constitutional rights by the Defendant" or that "The State of Texas did not meet its burden of showing that the Defendant made a free and intelligent waiver of his constitutional right not to be taken into custody by law enforcement officers without a warrant supported by probable cause." [4] It is unclear from the wording of the question presented for review exactly what federal question(s) petitioner contends should be reviewed by the Court.

[4] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The concept of waiver is distinctly different from that of consent in the context of a search or an encounter, and is ordinarily not used in analyzing whether conduct is consensual in the context of an encounter with the police. Based on a mistaken reading of cases involving consent searches, petitioner incorrectly asserted in both the appellate court below and the Court of Criminal Appeals of Texas (App. D, p. 5) that, under the Fourth Amendment, the State had the burden to prove by clear and convincing evidence that petitioner's consent to accompany the officers to the station was freely and voluntarily given. It is not clear that standards applicable to consent in the context of searches apply to seizure issues concerning whether police/citizen encounters are consensual. It will be assumed that they apply for the purpose of this brief. As will be later shown, the correct standard of proof in connection with the State's burden of proof in connection with consent to search issues under the Fourth Amendment is preponderance of the evidence, which is generally applied in suppression hearings. The fact that petitioner asserted an incorrect standard of review in this regard in his petition for discretionary review to the Court of Criminal Appeals of Texas may have been viewed by that court to be a sufficient reason to deny his petition.

The relevant question from among those petitioner presented for review in the appellate court below was embodied in his point of error number one, as follows: "The trial court erred in overruling the motion to suppress and in allowing the defendant's confession into evidence, because the confession was the result of an illegal arrest and inadmissible under the constitution of the United States and the State of Texas and the laws of the State of Texas." (Appellant's Brief, p. 2). This was the question addressed and decided by the appellate court below (App. A, Opinion, p. 1), which upheld the trial court's finding that petitioner freely and voluntarily accompanied the investigating officers to the station for questioning and was not arrested or in custody before he made incriminating remarks in connection with giving his statement.

Consequently, as nothing exceptional is presented by the instant case, the petition for a writ of certiorari should be denied as this Court does not ordinarily decide questions not raised or involved in the lower court. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5 (1980). *See also Adams v. Robertson*, 520 U.S. 83, 87-90 (1997)(holding question presented would not be reviewed where petitioner failed to meet burden to show it was properly presented to court below).

Petitioner's Contention Was Not Decided by The Highest State Court Because It Was Not Properly Presented

Petitioner's contention as presented to the Court of Criminal Appeals of Texas, the highest Texas court in which a decision could have been had, in his petition for

discretionary review was similar to the question presented for review to this Court, namely:

> The appellate court erred in overruling appellant's first point of error and in holding that the simple statement of "OK" was a knowing and intelligent waiver of the appellant's right not to be handcuffed and transported to the police station for the purpose of securing a statement from him by way of a confession. The confession was the result of an illegal detention in custody and inadmissible under the constitution of the United States and the State of Texas and the laws of the State of Texas.

(App. D, pp. 2, 3). Petitioner's contention as presented to the Court of Criminal Appeals of Texas differed from that he raised in the appellate court below, as was heretofore pointed out, and for that reason may well have caused the Court of Criminal Appeals of Texas to deny his petition for discretionary review, at least as to that issue, on the basis of state procedural grounds or state procedural default, an independent state ground for the decision. *See Fox v. State*, 930 S.W.2d 607 (Tex.Crim.App. 1996)("This Court reviews 'decisions' of the courts of appeals; as a general rule, we do not reach the merits of any party's contention when it has not been addressed by the lower appellate court.").

Petitioner has not met his burden to show the contrary. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987)(holding issue not properly presented to state courts, in accordance with general rule that where highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the contrary is shown by the aggrieved party); SUPREME COURT RULE 14.1(g)(i)(placing burden of

demonstrating proper presentation of federal questions sought to be reviewed on petitioner).

Consequently, a writ of certiorari should be denied because petitioner did not properly present the question actually decided by the appellate court below to the Court of Criminal Appeals of Texas, and the case was accordingly not decided by the highest Texas court that could have addressed the issue. *See* 28 U.S.C. § 1257 (allowing review by way of writ of certiorari of decision of highest state court in which decision could be had); *Adams v. Robertson*, 520 U.S. 83, 87-90 (1997)(holding question presented would not be reviewed where petitioner failed to meet burden to show it was properly presented to court below); *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963)(holding certiorari improvidently granted where state procedural default led to determination that appellate court deciding case was not highest state court from which a decision could be had within the meaning of 28 U.S.C. §1257).

The Case Was Properly Decided Under Correct Legal Standards by the Appellate Court Below

Respondent's position in the courts below and in this Court is that, based on the totality of the circumstances, petitioner voluntarily consented to accompany the law enforcement officers to the station and was not arrested, in custody, and detained until after he made his incriminatory admissions in connection with making the statement of which he complains. Accordingly, his confession was not the product of or tainted by an illegal arrest in violation of the Fourth and Fourteenth Amendments. The Court of Appeals for the Fourteenth District of Texas agreed with respondent's position in this

regard, finding no error in the trial court's findings of fact and conclusions of law to the effect that petitioner "[w]as not placed under arrest prior to his admission that he was involved in the complainant's disappearance." (App. A, Opinion, pp. 3-4). The decision of the appellate court below was correctly decided under the law and the facts for the following reasons.

As to the second part of petitioner's question presented for review to this Court, essentially whether the Texas courts applied the correct test "to determine if there was a waiver of constitutional rights under the United States Constitution," petitioner contends that the appellate court below used an improper test to determine consent by viewing the evidence presented at the suppression hearing in the light most favorable to the trial court's ruling (Petition for Writ of Certiorari, p. 9).[5] Petitioner contends that the court below instead should have required "[t]hat the evidence be 'clear and convincing' and not based on speculation" as to petitioner's consent to accompany the officers to the station. Petitioner asserts in that regard:

> Had the Court of Appeals applied the proper test concerning the consent of the Defendant for to [sic] the sudden detention by the officers, the conviction of the Defendant would have been reversed and a new trial ordered. Their failure to follow the applicable constitutional law deprived the defendant of his constitutional rights and entitles him to have this court [sic] correct the error committed.

---

[5] The appellate court below stated only: "We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling." (App. A, Opinion, p. 3). The court below correctly applied this standard to the extent it did because it is merely part of customary appellate standards of review as to suppression rulings by a trial court. *See, supra*, n. 1. Petitioner incorrectly asserts at p. 9 of the petition that the appellate court below indicated that it used this test to determine consent.

(Petition for Writ of Certiorari, p. 10).[6]

Based on the foregoing assertions by petitioner, his question presented for review should accordingly be reframed essentially as follows: Did the court below apply an improper test or standard of review for determining petitioner's consent to accompany the officers to the station for questioning under the Fourth Amendment where it did not determine whether the State met its burden to show petitioner's consent by clear and convincing evidence?

Assuming that specific proof of consent is required in circumstances such as those presented by the instant case, petitioner asserts an incorrect test or standard for review for determining consent under the Fourth Amendment, and has asserted the same incorrect test or standard of review throughout this litigation (*See* App. D, p. 5, where petitioner asserted in his petition for discretionary review to the Court of Criminal Appeals of Texas that the clear and convincing standard of proof was required by the Fourth Amendment).

The correct test that was actually applied by the appellate court below to determine whether petitioner's encounter with law enforcement authorities in the instant case was consensual under the circumstances presented was that set out in *Florida v. Bostick*, 501 U.S. 429, 434, 439 (1991), namely whether a reasonable person would feel free to disregard the police and go about his business, which is determined by looking at the totality of the circumstances. (*See* App. A, Opinion, p. 4-7). This standard does not

[6] Petitioner cites no meaningful authority for the proposition that clear and convincing proof is required by the Fourth Amendment. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986), cited at p. 10 of the petition, addressed waiver of the Sixth Amendment right to counsel, and did not establish a requirement for clear and convincing proof. *See, infra*, n. 7.

necessarily require, as an element, specific proof of an individual's consent, but assuming that specific proof of consent is required by the Fourth Amendment, the burden of proof placed on the prosecution would in any event be no more than a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 n. 14 (1974)(holding controlling burden of proof at suppression hearing involving question of consent to search under Fourth Amendment was no greater than by a preponderance of the evidence).[7]

The appellate court below correctly decided the case under appropriate legal standards. The court began its analysis of the situation presented with reference to the test for determining whether a person was in custody, namely, "[i]f under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." (App. A, Opinion, p. 4). *See*

[7] Petitioner's mistaken assertion at pp. 6 & 10 of the petition that the clear and convincing evidence standard is applicable to consent searches or other determinations of consent under the Fourth Amendment may have resulted from the fact that the Court of Criminal Appeals of Texas has applied that degree of proof to the prosecution's burden of proof in connection with consent to search issues arising under Article I, Section 9 of the Texas Constitution. *See Maxwell v. State*, 73 S.W.3d 278, 281 (Tex.Crim.App. 2002)("The federal constitution requires the state to prove the validity of the consent by a preponderance of the evidence; the Texas Constitution requires the state to show by clear and convincing evidence that the consent was valid.").

Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968), relied on by petitioner for the clear and convincing proposition at p. 6 of the petition, which presented the question of voluntariness of consent to search a private residence given only after an officer asserted that he possessed a warrant, held only that a prosecutor has the burden of proving that consent to justify the lawfulness of a search was freely and voluntarily given, and that a showing of only mere acquiescence to a claim of lawful authority was insufficient. *Bumper* did not hold that proof by clear and convincing evidence, as opposed to proof by a preponderance of the evidence, was required in cases involving consent. That issue was subsequently addressed and resolved in favor of the preponderance of the evidence standard in *Matlock*. Consequently, if proof of consent is required in this regard under the Fourth Amendment, the burden of proof is by no

Stansbury v. California, 511 U.S. 318, 322 (1994), and cases cited therein. The court considered all of the relevant circumstances of the case as found by the trial court as to events occurring prior to petitioner's encounter with the investigating detectives on the morning of January 27, including specifically the following:

> appellant had met Detective Pinkins previously in connection with the investigation into the complainant's disappearance;
>
> on at least two previous occasions, appellant voluntarily went to the sheriff's department to answer questions and take a polygraph examination in connection with the investigation;
>
> on both prior occasions, appellant was allowed to leave the sheriff's department and was given no reason to believe that he was a suspect in the investigation;
>
> on one of those occasions, appellant had been placed in handcuffs before being transported in a patrol car, and the handcuffs were removed once appellant arrived at the station;
>
> appellant had never been questioned in connection with the investigation at any location other than the sheriff's deparment.

(App. A, Opinion, p. 5).[8] As heretofore noted, reference to or discussion of these facts showing the prior relationship between petitioner and the investigating detectives during the course of the investigation was substantially omitted in the petition.

---

more than a preponderance of the evidence in any event. Petitioner has not contended that the evidence presented was not sufficient to meet the preponderance of the evidence standard.

[8] The fact that the testimony showed that it was standard procedure for the Harris County Sheriff's Department to handcuff persons being transported, and that petitioner was in fact handcuffed previously in connection with being transported and was on the occasion in question, but that the handcuffs were removed prior to questioning on each occasion, was properly viewed by the appellate court below and taken into account as merely a circumstance to be considered in determining whether petitioner was in custody. *See Rhodes v. State*, 945 S.W.2d 115, 117-18 (Tex.Crim.App. 1997)(holding handcuffing merely a circumstance in determining whether an

The appellate court below went on to find no evidence of any express or implied threats that petitioner would be forcibly taken to the station on the occasion in question for questioning, and concluded based on the trial court's determination of the historical facts and the totality of the circumstances "[t]hat a reasonable person in appellant's situation would have felt free to say 'no' or otherwise to disregard Detective Pinkins and go about his business. Instead, by saying 'Okay,' appellant indicated his consent to accompany Pinkins to the sheriff's department offices for questioning." (App. A, Opinion, p. 6)(citation omitted). The appellate court below determined all that was required by the Fourth Amendment in any event. In doing so, the appellate court below recognized that the case "[m]ust be narrowly construed based on the unique facts presented," and expressed no opinion on situations where "[t]he individual had no previous interaction with the police department and its investigative procedures." (App. A, Opinion, p. 7, n. 4).

The appellate court below clearly applied the appropriate legal standards for evaluating the situation presented and the consensual nature of petitioner's encounter

---

arrest has taken place), and cases cited therein. Handcuffing for safety reasons is not per se unreasonable. *Id.* The prior event showed petitioner's knowledge of the safety procedure and the fact that its application to him was not indicative of an arrest under the circumstances. The appellate court below expressly found based on the circumstances "[t]hat a reasonable person in appellant's position would not believe that being put in handcuffs was a significant restriction on his freedom of movement. Furthermore, appellant did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation with the law enforcement officers transporting him." (App. A, Opinion, pp. 6-7). The fact that questioning occurred at the station was simply a circumstance to be considered and was not dispositive on the question of custody. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983)(holding stationhouse questioning does not in and of itself show custody). Likewise, the time of the encounter is not controlling and is but a factor to consider. There is no constitutional requirement prohibiting the police from contacting a person at any particular time.

under the Fourth Amendment as dictated by *Stansbury v. California*, *Florida v. Bostick*, and *United States v. Matlock*, *supra*. Petitioner's contention that said court applied an incorrect test or legal standard for determining consent contrary to the requirements of the Fourth Amendment is patently without merit.

Review Is Sought of a Decision Turning Upon
An Analysis of the Particular Facts Involved

As heretofore shown, the instant case was decided primarily upon the basis of the unique factual situation presented to the courts below. As heretofore stated, petitioner does not contend any facts found have no basis in the record. The appellate court below concurred in the factual determinations made by the trial court. No showing of any obvious or exceptional error in that regard has been shown by petitioner. *See United States v. Doe*, 465 U.S. 605, 614 (1984)("Therefore, we will not overturn that finding unless it has no support in the record. *Ibid.* Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred.").

All facts found by the trial court had evidentiary support. The case is simply too fact-bound to merit consideration of this Court. Few, if any, other litigants would be affected by a decision in this case in any event. Neither an important federal question nor anything of substantial importance to the jurisprudence as a whole is presented. See SUPREME COURT RULE 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

No Conflicting Decisions or Unsettled Questions

Petitioner has failed to demonstrate that the decision of the appellate court below conflicts with any decisions from this Court or any other on an important question of federal law within the meaning of SUPREME COURT RULES 10(a)-(c). A principal purpose for the exercise of certiorari jurisdiction is resolution of conflicts among federal appellate courts and state courts as to the meaning of provisions of federal law. *See Braxton v. United States*, 500 U.S. 344, 347 (1991). The cases cited by petitioner, many of which are inapplicable to the situation presented, state only general principles of law. Petitioner supplies no argument as to how the cited cases conflict with the decision of the appellate court below as to any important question of federal law.

Moreover, petitioner has neither asserted nor demonstrated that the appellate court below decided an important question of federal law that has not been, but should be, settled by this Court within the meaning of SUPREME COURT RULE 10(c). Consequently, certiorari should be denied.

CONCLUSION

It is respectfully submitted based on the foregoing reasons that the petition for writ of certiorari should be denied.

Charles A. Rosenthal, Jr.
Harris County District Attorney

Donald W. Rogers, Jr.*
William J. Delmore III
Assistant District Attorneys
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
*Counsel of Record

Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served upon the petitioner's attorney at the following address on the date of filing same by first class United States mail, certified return receipt requested, with postage prepaid and affixed thereto:

Jimmy Phillips, Jr.
Attorney at Law
Attorney for Petitioner
P. O. Drawer 29
Angleton, Texas 77516-0029

DONALD W. ROGERS, JR.
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5826
Counsel of Record

Date: December 19, 2002